DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CA06-634

February 14, 2007

REBECCA PILCHER

APPELLANT

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES

APPELLEE

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT
[NO. JV-2003-735]

HON. VICKI S. COOK,
CIRCUIT JUDGE

AFFIRMED

Rebecca Pilcher appeals from an order of the Garland County Circuit Court terminating her parental rights to E.B. and C.B., who were born September 16, 1999, and May 4, 1998, respectively. On appeal, Pilcher argues that the trial court erred in terminating her parental rights because: 1) no case plan was ever filed for record; 2) the trial court erred in admitting "very prejudicial" hearsay testimony; and 3) the decision to terminate was not supported by clear and convincing evidence. We affirm.

On December 2, 2003, E.B. and C.B. were turned over to ADHS custody by their maternal grandmother, Margie Bennett. Pilcher had been arrested for failure to pay fines and Bennett decided that she was unable to care for the children due to her health problems and financial status. ADHS conducted a "mediation staffing" on January 22, 2004, that was not

attended by Pilcher, because, according to her trial counsel, she was afraid she would be arrested for her outstanding bench warrants. Margie Bennett, however, was present. Case worker Julie Garcia reported that at that meeting, she discussed "things that have been done, things we're working on, and things that we were working towards."

An adjudication hearing was held on January 29, 2004, and Pilcher failed to attend. No formal case plan had been developed, but Garcia testified that she "had an opportunity to develop at least a formative case plan." This so-called "formative case plan" contained the requirements usually imposed on a parent by ADHS: obtain stable housing and stable employment, attend parenting classes, submit to a psychological examination, and remain "clean and sober." This latter requirement was imposed even though Garcia did not believe that there were any substance abuse "issues" in this case and noted that Pilcher had tested negative for drugs. Garcia also stated that ADHS was going to "work towards" getting "other services" for Pilcher, "such as counseling and - - and possible job training with the rehab."

After the children had been in foster care for approximately five months, E.B. began to act out sexually. The foster mother had ADHS move the child to a new foster home. It was subsequently revealed that the foster mother was living with a man, not her spouse, around the time Pilcher complained to ADHS that she suspected that E.B. was being sexually abused. Garcia, on her own initiative, placed the children in therapeutic foster care. The trial court ratified that decision, even though it meant that Pilcher would be denied contact with her children for a minimum of thirty days, and the course of treatment associated with therapeutic foster care would last twelve to twenty-four months.

Permanency-planning hearings were held on October 27, 2004, and March 9, 2005. Pursuant to those hearings, orders were entered finding that ADHS had complied with the case plan and that Pilcher had "substantially" complied. The case goal remained reunification.

Pilcher, however, did not attend a permanency-planning hearing that was held on September 7, 2005. Pilcher's attorney stated to the trial judge that Pilcher was unable to attend because she was scheduled for laparoscopic surgery. The trial judge took "judicial notice" that a laparoscopy is not "life threatening," and ordered that a Garland County deputy bring Pilcher to court. Meanwhile, the judge ordered the hearing to be held as scheduled. Eventually, the deputy returned and reported that there was a note on the door saying "do not disturb" and there was no answer when he knocked.

At the hearing, ADHS operatives Hassan Salloukh and Amber Gilchrist, CASA Jack Cooley, and E.B.'s therapist Dane Nielsen recommended that Pilcher's parental rights be terminated. Margie Bennett, who had been given court-appointed representation also testified. Bennett stated that she wanted to be awarded custody of the children. She acknowledged that she had turned the children over to ADHS, but had done so to keep them away from Pilcher. During the pendency of this case, Bennett had discovered that the children were eligible for SSI, which would bring "four to five hundred dollars apiece per month." She stated that she could move into a larger home. According to Bennett, she loved her daughter, but Pilcher was "very irresponsible." She stated that Pilcher had been "physically aggressive" with her in the past and often screamed profanity at her. She claimed that Pilcher

caused her to be evicted "at least eight times" and that Pilcher was about to be evicted from her apartment. Bennett believed that Pilcher did not show up for the hearing because she had "a warrant or possibly two warrants today." Bennett stated that Pilcher's boyfriend, James Carter, often stays with her, and she stated that Pilcher told her that he "struck her."[1]

The trial judge entered an order changing the case goal to termination of Pilcher's parental rights. She found that Pilcher "**has not maintained** compliance with the case plan; that mother did not follow the case plan and follow all recommendations of psychological evaluation." (Bold face in original.) The trial judge also suspended Pilcher's visitation with the children.

At the October 28, 2005, termination hearing, the trial judge granted ADHS's motion to incorporate the testimony and all exhibits from the previous hearings. Having granted this motion, the trial court actively limited testimony at this hearing. CASA Jack Cooley testified that although Pilcher did complete "some elements" of the case plan, she failed to fully comply with the requirement that she receive "CCS counseling." He also stated that he believed that Pilcher failed to maintain employment and housing, however, he admitted that he did not have direct knowledge of these situations. Cooley recommended termination of Pilcher's parental rights. Nielsen and family service worker Shelley Walker made a similar recommendation. On cross-examination, Walker attempted to state that C.B. expressed a

[1] Inexplicably, the trial judge announced from the bench, "For the record, she said he beats her."

desire to "go home to mama," but the trial judge announced, "Would this not be hearsay? I think this is hearsay and certainly objectionable."

Pilcher testified, but had difficulty focusing on the questions due to her obvious anger. She, however, stated that even though she had lived at one residence for a year and a half, she had recently been forced to relocate. She also stated that the suspension of her driver's license due to outstanding fines had prevented her from obtaining employment as a backhoe operator. Pilcher asserted that her biggest obstacle to regaining custody of her children was her difficulty in paying her fines. She denied using drugs or alcohol or being mentally ill. Pilcher stated that she had found section eight housing, but could not move in because she had an outstanding $908 gas bill that she could not pay. She also stated that the individual counseling that she attended and the community service she was required to do to work off her fines occupied five days per week. Nonetheless, Pilcher conceded that despite the fact that the children had been in ADHS custody for 677 days, she had been unable to rectify her problems with housing and her fines. The hearing concluded with Bennett once again attempting to get custody of the children. Toward that end, she stated that Pilcher had threatened suicide.

The trial judge granted ADHS's termination petition. She found that Pilcher had attended only one court-ordered counseling session; had not obtained suitable housing or maintained employment; failed to make regular payments on her fines, resulting in additional fines and warrants; and failed to exhibit the ability to provide her minor children with their

necessities. The order also stated that "despite this Court's order to the contrary, mother persists in having contact with James Garner [sic]."

We review termination of parental rights cases de novo. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). We judge the factual basis for terminating parental rights under a clearly erroneous standard; however, with regard to errors of law, no deference is given to the trial court's decision. *See Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003).

Pilcher first argues that the trial court erred in terminating her parental rights because no case plan was ever filed for record. She contends that the plain language of Arkansas Code Annotated section 9-27-402 requires that case plans shall be developed in all dependency-neglect cases and filed for record. Pilcher, however, concedes that there were numerous references to a case plan in this case. Nonetheless, she further asserts that "even if the case plan had been made part of the record in this case, it would not have complied with State law" and would therefore "prove" that her due-process rights were violated. We find this argument unavailing.

While we are much concerned about irregularities in this case, we are constrained by well-settled law that we do not reach constitutional arguments in termination cases if the argument is not raised to the trial court. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992); *Walters v. Arkansas Dep't of Human Servs.*, 77 Ark. App. 191, 72 S.W.3d 533(2002). Furthermore, we note that in reversing the court of appeals in *Rodriguez v. Arkansas Department of Human Services*, 360 Ark. 180, 200 S.W.3d 431 (2004), the supreme court

created an appellate presumption that if there is "evidence in the record that a case plan existed" it must have been properly filed.

Pilcher next argues that the trial court erred in admitting "very prejudicial" hearsay testimony. The hearsay in question came in though the testimony of the CASA, who stated:

> I really, um, mentioned that the present foster parent had to undergo kidney stone removals a couple of weeks ago, so we had to put [E.B.] in Respite at that time. And—um—[E.B.] was with the ex-foster parents. So the ex-foster parent went to pick her up from the kiddy park, and [E.B.] was extremely freaking out because she had been begging the new foster parents to adopt. What happened is the child was so traumatized, acting out, scared, and insecure, begging the ex-foster parent, please don't take her and put her back with Rebecca because she was under the impression because the new foster parent is really ill.

Pilcher's trial counsel objected, and without waiting for argument by opposing counsel, the trial judge declared that it was an "excited utterance" and admitted the testimony. Pilcher argues that it was error to admit the hearsay because "it was so prejudicial that at that point on the Court's mind [sic] was so poisoned against the mother reunification became impossible."

Matters pertaining to the admissibility of evidence are left to the sound discretion of the trial court, and we will not reverse such a ruling absent an abuse of that discretion. *See, e.g., Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). Furthermore, we will not reverse absent a showing of prejudice, as prejudice is not presumed. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999).

We acknowledge that the trial court clearly erred in admitting the testimony in question. It was not hearsay subject to the excited-utterance exception as the trial judge

asserted, but double hearsay. The excited utterance exception is covered by Rule 803(2) of the Arkansas Rules of Evidence, while double hearsay or "hearsay within hearsay" is subject to Rule 805. Rule 805 states:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Even if E.B.'s statement came within the excited-utterance exception, we can find no exception applicable to the former foster parents. Indeed, given the fact that Pilcher had in essence attributed E.B.'s sexual acting out to things that had allegedly occurred while she was in their custody, we believe that there are not insufficient indicia of reliability to make the testimony admissible. Nonetheless, we do not believe that this argument warrants reversal.

We note that Pilcher has not specifically attacked the trial judge's ruling, merely its prejudicial effect.[2] We find this flaw in her argument to be fatal. E.B.'s preference as to her placement is irrelevant in this case. Furthermore, we believe that the trial judge had exhibited her clear intention to terminate Pilcher's parental rights long before the hearsay testimony was erroneously admitted. Based on our review of the record, we believe it establishes that the termination of Pilcher's parental rights was a fait accompli at the conclusion of the September 7, 2005, permanency-planning hearing. Accordingly, we believe that Pilcher has failed to demonstrate prejudice.

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[2] In this regard, Pilcher's argument seems to be not be an argument related to hearsay, but rather one that invokes Rule 403 of the Arkansas Rules of Evidence, that the statement was more prejudicial than probative.

For her final point, Pilcher argues that the decision to terminate was not supported by clear and convincing evidence. She states that there were "numerous hearings whereby there was evidence that was favorable to both sides." Further, Pilcher asserts that "the majority of that evidence, including the negative information, was not presented to the Court on October 28, 2005," and because the trial court "took judicial notice of everything previously presented, the negatives and positives would have to be considered." The consequence, she believes, is that the decision to terminate was not supported by clear and convincing evidence. This argument is not persuasive.

As we noted previously, our review is de novo, so, we are obligated to review all the evidence. Nonetheless, after our de novo review, we must conclude that the decision to terminate Pilcher's parental rights is not clearly erroneous. By her own testimony, Pilcher concedes that she did not solve her housing, employment, and legal problems that led to her children being taken into ADHS custody. Furthermore, there was unrebutted testimony from Cooley that Pilcher had failed to comply with the requirement in the case plan that she submit to a specific type of counseling. While one might question the importance of this requirement in the case plan when the children were removed from her custody because she was incarcerated due to her failing to pay fines, we cannot overlook Pilcher's noncompliance. Our supreme court has determined that failure to comply with an ADHS case plan, however onerous, is sufficient grounds for termination of parental rights. *Jones v. Arkansas Dep't of Human Servs.*, 361 Ark. 164, 205 S.W.3d 778 (2005) (affirming the termination of parental rights where an obese appellant failed to stick to her diet).

Affirmed.

MARSHALL and HEFLEY, JJ., agree.